IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 25548/2008

Reportable only in the electronic reports

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.

25 OCT 2012 .....

DATE

.....

SIGNATURE

In the matter between:

BEAUX LANE SA PROPERTIES (PTY) LIMITED Plaintiff

and

TRESSO TRADING 193 (PTY) LTD t/a LEISUREFURN Defendant

JUDGMENT

WILLIS J:

[1] This is an action in which the plaintiff claims payment of rental in terms of on an oral agreement of lease concluded between the parties. The precise terms of the agreement are in dispute.

[2] A close corporation, known as Madisons Furniture Manufacturers CC and which traded as 'Madisons' as a retail furniture dealer at a shopping mall in at 22 White Hills Close in Fourways and elsewhere, was placed under provisional liquidation early in 2008. This action relates to the Fourways premises to which premises I shall hereinafter, for the sake of convenience, refer simply as 'the premises'. These premises measured approximately 1021 square metres in size.

[3] The plaintiff owned the premises in question. It was the landlord. Madisons was the tenant. The defendant, which trades as 'Leisurefurn', imports furniture mainly from Asia which it distributes to dealers such as Madisons. At the time of the liquidation of Madisons, Madisons owed Leisurefurn just short of one

million rand in respect of stock which Madisons had bought from the defendant.

[4] The managing director of the defendant is Mr Lawrence Kaplan. He is a qualified chartered accountant. He is dynamic, charming and imaginative. If an one ever has ever dreamt of having 'an uncle in the furniture business', Mr Kaplan is the man of dreams. He came up with the commercially sensible idea that the best way for the defendant to recoup its impending losses from its trade with Madisons would be to buy up all stock from the liquidators and to trade out of the difficulty. It made sense, in Mr Kaplan's estimation, to trade from the premises. He had to move quickly to 'clinch a deal' with the liquidators and the plaintiff as landlord.

[5] With this kind of deal in mind, Mr Kaplan set up a meeting with the plaintiff at the plaintiff's offices in Sandton on 20 February 2012. Based in Cape Town, Mr Kaplan travelled to Johannesburg for this purpose. Mr Jeremy Clark and Mr Ron Van Der Bos, directors of the plaintiff, represented the plaintiff at the meeting. Mr Clark was the principal actor for the plaintiff. Mr Peter Bothomley, the liquidator of Madisons, was also present at the meeting.

[6] Mr Clark is a duly qualified attorney who had practiced at the Johannesburg Bar some years ago. He now works as a property developer and asset manager. Mr Kaplan and Mr Clark exemplify the truth that there is more money to be made by selling things than by selling time.

[7] Mr *Kantor*, who appeared for the defendant, put it to Mr Clark during cross examination that he, Mr Clark, was a thorough and meticulous person. Mr

Kantor had an accurate measure of his man. Mr Clark also impressed as a man of the utmost integrity. During the course of argument Mr *Kantor* fairly and correctly conceded that he could not gainsay this impression.

[8] As with the defendant, the liquidation of Madisons had placed the plaintiff in a quandary. The plaintiff faced the prospect of being without a rental income for the premises for several months at least. The plaintiff had been receiving about R98 000 per month as rental from Madisons prior to its liquidation.

[9] After of volley of proposals and counter-proposals, the parties agreed that the defendant would rent the premises until the end of March 2008 at a rate of R2000- a day. This much is common cause. It is also common cause that the defendant paid the plaintiff R82 080- on 27 March 2008 and has made no further payments. As between the plaintiff and the defendant there was a marriage of mutual convenience. It was not one made in heaven. There has been disagreement over other terms and conditions of the agreement between them.

[10] As is his custom, Mr Clark made contemporaneous notes in his diary during his meeting with Mr Kaplan. Mr Clark kept his notes. These notes were an exhibit during the trial. Mr Clark's notes of the meeting on 20 February 2008 with Mr Kaplan record, under item, 7 which notes the 'BLP proposal' that the lease would be 'until 31/3, thereafter at 2 weeks notice. Rent R2000 p.d.+ VAT. 25/2-31/3 is ± R72K + VAT. T/O clause of 2% incl of our VAT. 2 Week notice: 1st date mid-March. After 31/3/08 R2000 p.d. + VAT @ 2% t/o'.

[11] Mr Clark was adamant that, at the meeting of 20 February 2008, the parties agreed on this 'BLP proposal'. On 25 Febuary, Mr Clark sent Mr Kaplan a letter setting out the terms of the agreement concluded at the meeting. Mr Clark had difficulty in ensuring that the letter arrived by telefacsimile ('fax'). He resent the letter on 26 February 2008 using a different fax number. This letter, dated 26 February 2008 was an exhibit in the trial.

[12] In the letter of 26 February Mr Clark records, *inter alia*, the following:

> 12.1 'This letter embodies the terms discussed at the meeting (i.e. of 20 February 2008) regarding your leasing the premises, which will be the terms of the lease'.
>
> 12.2 'The initial term of the lease will be from date of both parties signing this document until 31st March 2008'.
>
> 12.3 'From 1st April, 2008, the lease will continue as a monthly tenancy, terminable by two weeks written notice by either party, such notice not to be given to take effect before 31st March 2008'.
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> 12.4 'The rent will be: 7.1 R72 000-00 (seventy-two thousand rand) (exclusive of VAT which will be charged) for the period from inception until 31st March 2008... 7.2 R2000-00 (two thousand rand) per day (exclusive of VAT) from 1st April 2008 (we suggest that the tenant pays for the two weeks in advance every two weeks, being the notice period then applicable).'
>
> 12.4 'The parties will formalise this lease by signing the standard lease of RMB (Rand Merchant Bank) Properties applicable to our portfolio currently managed by them. Until then, this letter shall serve as the lease document once it is signed by both parties'.

Mr Kaplan did not sign the document. At no stage did he ever suggest that any amendments be made to the document sent to him by Mr Clark for signature. Mr Kaplan did not, at any material time, protest about the accuracy of the

contents of Mr Clark's letter. No formal lease prepared by RMD properties was signed as between these parties.

[13] Subsequent to the defendant having paid the plaintiff R82 080- on 27 March 2008, the plaintiff did not hear from the defendant. On 5 May 2008, the plaintiff discovered that the defendant had vacated the premises. On the defendant's own version of events, it had vacated the premises in early April 2008. Mr Van Der Bos wrote an email letter to Mr Kaplan on 6 May 2008 in which he recorded the plaintiff's surprise that the defendant had vacated the property and asked, 'When did you leave and who did you leave the keys with?' Mr Van der Bos asked the defendant to undertake a reconciliation of accounts and to pay the balance due to the plaintiff.

[14] Mr Kaplan's version of events is that there was an agreement that the defendant would rent the premises for R2000- per day for the period of 1 to 31 March only. There was no notice period and no turnover clause.

[15] There is a discrepancy in the evidence of Mr Clark and Mr Van Der Bos inasmuch as Mr Clark said that it had been agreed between the parties that the two week notice period could be given in mid March 2008 but Mr Van der Bos testified that it was agreed that the two week notice period could only be given after March 2008.

[16] Mr Kaplan sent an email to Mr Clark on 26 March 2008 in which he states: 'Also received April statement from them?? Please discuss with them'. Mr. Kaplan sought to explain that he was thereby indicating that they had not agreed on tenancy for April and, accordingly, no invoice for April ought to have been issued. The plaintiff has claimed rental until 11 August 2008.

[17] In evaluating the evidence, I have had regard to the well-known passage set out in the case of *Stellenbosch Farmers' Winery Group Limited & Another v Martell et Cie & Others*[1] as follows:-

> On the central issue, as to what the parties actually decided, there are two reconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows:
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> To come to a conclusion on the disputed issues, a court must make findings on:
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> a) the credibility of the various witnesses;
> b) their reliability; and
> c) the probabilities.
>
> As to (a) the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors not necessarily in order of importance such as:
>
> (i) the witness' candour and demeanour in the witness-box,
> (ii) his bias, latent or blatant,
> (iii) internal contradictions in his evidence,
> (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,
> (v) the probability or improbability of particular aspects of his version,
> (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incidents or events.
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> As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv), (v) above, on
>
> (i) the opportunities he had to experience or observe the events in question and

[1] 2003 (1) SA 11 (SCA) at paragraph [5]

(ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of a probability or improbability that each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

[18] There could have been misunderstandings between Mr Kaplan, on the one hand and the representatives of the plaintiff on the other. The major difficulties for the defendant are the following:

18.1 It is Mr Kaplan's case that there was an agreement concluded on 20 April 2008, not that no agreement had been concluded between the parties.

18.2 If an agreement had been concluded between the parties and the defendant paid, what were the terms of this agreement?

18.3 There is no reason to doubt that Mr Clark's notes on 20 February were contemporaneous and reflected what he must have understood the agreement to be.

18.4 Mr Clark's letter to the defendant dated 26 February confirms Mr Clark's notes of 20 February save for the aspect of whether the two-week notice period needed to have been given in writing.

18.5 Why did Mr Kaplan not respond to Mr Clark's letter with a protest that this or that item had been recorded wrongly and needed to be corrected?

18.5 The parties needed reasonable flexibility as to the arrangement because it was dependent on a number of contingencies, the most important of which would have been obtaining the approval of the Master to try to trade out of the problem and how successful the 'liquidation sale' would prove to be. The very uncertainties inherent in the situation favour Mr Clark's version more than Mr Kaplan's.

18.6 If the agreement had been from 1 to 31 March only, why did the defendant pay the plaintiff an amount in excess of the amount that would be payable for 31 days only at the rate of R2000 per day?

18.7 The defendant's plea and affidavit resisting summary judgment sets the date of commencement of the lease at 25 February and not 1 March as Mr Kaplan claimed.

18.7 On the defendant's own version, the defendant did not vacate the premises on 31 March but did so some time after that.

18.8 In context, the question marks of Mr Kaplan after the observation that he had received the April statement from the managing agents is equally consistent with the interpretation that the duration of the lease for the whole of April had not yet been decided (as it would have been premature to do so), as with the interpretation that the agreement would come to an end at the end of March.

18.9 The discrepancy as between the evidence of Mr Clark and Mr Van Der Bos respectively neither not fundamentally undermines the credibility of the plaintiff's witnesses nor the probability that a fixed term agreement ending on 31 March 2008 had not been agreed

between the parties. Whether or not notice could be given during the month of March does not affect the outcome of this case.

[19] Mr Clark explained Mr Kaplan's conduct, inter alia, as being attributable to his having a 'cavalier attitude' to commercial agreements of the kind in question. Continuing with the horse-riding imagery, I put it to Mr *Kantor* during the course of argument that Mr Kaplan was not so much the jolly aristocrat astride his horse while careless as to the seriousness of the human condition as he was redolent of a 'cowboy'. Mr *Kantor* protested that would be a deeply insulting portrayal of Mr Kaplan. I did not intend to be gratuitously insulting. In having the image of a 'cowboy' in mind, I was affected by his having presented strongly in court as a person who is happiest in an environment of legal minimalism, where the rules are 'made up as one goes along'. I, personally, have much affinity with those who favour legal minimalism. Better a 'Wild West' attitude to life than hand-wringing, in the manner of Uriah Heep.[2] I believe that most contemporary societies around the world are over-regulated, burdened with an excessive deference among the chattering classes to what are believed to be the beneficial effects of draconian legal remedies for all manner of problems.

[20] The corollary to the economic freedom with which Mr Kaplan has so strong an attachment is adherence to the maxim *pacta sunt servanda*. This may be translated, somewhat limply, into English as 'agreements must be observed'. The moral, social, economic, political and legal imperatives inherent in the Latin expression are lost in translation.

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[2] Uriah Heep is a fictional character invented by Charles Dickens for his novel, *David Copperfield*. Now that an English rock band has taken its name after him, Uriah's profile has increased somewhat. Mr Heep is perhaps still not as famous as Humpty Dumpty.

[21] I agree with Mr *Kujawa*, who appeared for the plaintiff, that the probabilities favour the conclusion that the terms of the contract between the parties were those claimed by Mr Clark. These terms include the 'turnover clause' that the defendant would pay, as part of its rental, 2 % monthly, inclusive of VAT, of its turnover. These turnover clauses have become increasingly common in commercial tenancy agreements relating to properties falling within the area of jurisdiction of this court. They tend to appear where the fixed amount of the rental is, as in this case, below the prevailing market norm. 'Turnover clauses' in lease agreements help to ease the pain for the tenant, while acting as a cushion for the landlord against receiving below market payments for the lease.

[22] The plaintiff has claimed a rendering of an account by the defendant for the turnover generated by the defendant for the relevant period, a debate of that account and payment of what appears to be due to the plaintiff upon such a debate. The plaintiff is entitled to this relief.

[23] Ever since the case of *Victoria Falls & Transvaal Power Company Limited v Consolidated Langlaagte Mines Limited*[3] it has been clear, throughout the land, that it is the duty of an innocent party aggrieved by the other party's breach of contract to take steps to 'mitigate the loss consequent upon the breach'.

[24] On 5 May 2008 the plaintiff became unequivocally aware that the defendant had no intention of continuing its occupation. Accordingly, the plaintiff had as good as received proper notice (it matters not whether the

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[3] 1915 AD 1 at p22. See, also, *Versveld v SA Citrus Farms Limited* 1930 AD 452 at 454 and *Hazis v Transvaal and Delagoa Bay Investment Company Limited* 1939 AD 372 at 388.

agreement required the notice to be in writing or not) on 5 May 2008, effectively terminating the agreement on 19 May 2008. I agree with Mr *Kantor* that, on this version rental would be payable from 1 April to 19 May 2008 at R2000- per day for 49 days (i.e. an aggregate amount of R98 000- would be payable by the defendant for this period). *Mora* interest is to run on this sum from 15 August 2008, the date of service of the summons.

[26] Judgment is given against the defendant in favour of the plaintiff. The order of the court is the following:

> (i) The defendant is to pay the plaintiff the sum of R98 000- (ninety-eight thousand rand), plus Value Added Tax (VAT) together with interest on the aforesaid sum (ninety-eight thousand rand plus VAT) at the rate of 15,5 % *per annum* from 15 August 2008 to date of payment;
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> (ii) The defendant is to render to the plaintiff a full account, supported by vouchers, of the turnover generated by the defendant at the premises at 22 White Hills Close, Fourways for the period from 1 March 2008 to 19 May 2008;
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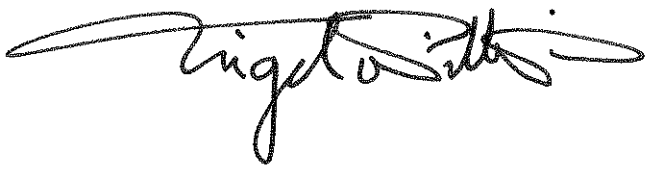
> (iii) The defendant is to debate the aforesaid account of turnover with the plaintiff;
>
> (iv) The defendant is to pay the plaintiff 2 % of the defendant's turnover for the period 1 March 2008 to 19 May 2008 together with the plaintiff's VAT charges in respect thereof;
>
> (v) The defendant is to pay the plaintiff's costs of suit.

DATED AT JOHANNESBURG THIS 25th DAY OF OCTOBER, 2012



N. P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the plaintiff: Adv. *R.W.M. Kujawa*

Counsel for the defendant: Adv. *A. Kantor*

Attorney for the plaintiff: Marcou Gluch

Attorneys for the defendant: Werksmans Inc.

Dates of hearing: 3-5 October 2012

Date of judgment: 25 October 2012